No. _____

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In The Supreme Court of the United States

SHELDA HARRIS BANNON,
as parent and natural guardian of her daughters
Sharah Harris and Brittni Harris,

Petitioner,

v.

SCHOOL DISTRICT OF PALM BEACH COUNTY,
a body corporate, and ED HARRIS, individually
and in his capacity as principal of
Boca Raton Community High School,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did school officials engage in viewpoint discrimination in violation of the First Amendment when they required that religious references be removed from murals painted by a student on construction barriers at a public school as part of a project meant to allow for student expression and school beautification?

II. Does the First Amendment allow school officials to discriminate on the basis of viewpoint in censoring student speech that also is considered "school-sponsored" speech under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)?

III. Did the Court of Appeals err in holding that a mural project, which was intended to beautify a school and serve as a forum for student expression, was "school-sponsored" speech subject to regulation on grounds reasonably related to pedagogical interests under *Hazelwood*?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings before the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Florida are listed in the caption to this Petition.

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OPINIONS BELOW

The order and judgment of the United States District Court for the Southern District of Florida is not reported and is set forth in the Appendix beginning at A-26. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004), and is set forth in the Appendix beginning at A-1. The order denying the Petitioner's Petition for Rehearing En Banc is not reported and is set forth in the Appendix beginning at A-24.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, which is the subject of the instant Petition, was entered on October 12, 2004. A Petition for Rehearing En Banc was filed by the Petitioner on November 1, 2004, which was denied in an order entered by the Court of Appeals on December 9, 2004 (A-24). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, § 1, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In late January and early February 2002, Boca Raton Community High School, a public high school in Palm Beach County, Florida, was undergoing renovations. Plywood panel barriers placed around construction areas during construction were unsightly so the school administration invited students to paint murals on these barriers as a beautification project. Respondent Ed Harris, principal of the high school, approved a project in which students or staff members were permitted to paint the panels. The project was conducted as a fundraiser for the Student Council. Students were to provide their own murals, and the only instructions given by school officials were that the murals not be profane or offensive and that the murals include the students' own expression. Students were not required to present their proposed murals for prior approval

and were permitted to express themselves freely in their artwork.

Sharah Harris, then a senior at the high school and a member of the Fellowship of Christian Athletes Club, decided to participate in the project, along with other members of the Club. On a Saturday afternoon, Sharah and other Club members painted several murals with religious messages. In one mural, the students wrote "Because He ♥ed, He Gave," and had a cross in the background. Another read, "Jesus has time for you; do you have time for Him?" And a third read, "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God."

The following Monday morning, Respondent Ed Harris saw the murals and determined that Sharah had participated in painting them. Principal Harris and Cathy Roberts, the teacher supervising the project, went to Sharah's class, called her out, and instructed Sharah to paint over the murals to remove the religious references. In accordance with their directives, Sharah painted over the murals after school that day to remove religious symbols and language, replacing the references to God and Jesus with neutral pronouns such as "He" and "Him." Sharah was only required to remove religious references from her murals. Petitioner Shelda Harris Bannon, Sharah's mother, thereafter complained to the Respondents about their order that the religious references in the murals be covered up. Petitioner argued that this constituted unacceptable censorship and had subjected Sharah to humiliation and public ridicule because of Sharah's religious beliefs. However, the Respondents took no action in response to Petitioner's complaints.

As a result, Petitioner filed this action in the United States District Court for the Southern District of Florida, alleging causes of action against the Respondents under 42 U.S.C. § 1983 for deprivations of her daughters' rights under the First Amendment.[1] The District Court had jurisdiction over the action under 28 U.S.C. §§ 1331 and 1343. After discovery was conducted, the Respondents filed a motion for summary judgment. The District Court granted the Respondents' motion entering final judgment that the Petitioner take nothing (A-34). In an accompanying order explaining its reasoning, the District Court ruled that the mural project was not a public or limited public forum for expression (A-30). Instead, it determined that the project was school-sponsored speech over which educators may exercise greater editorial control (A-31). The District Court held that the decision to eliminate Sharah's religious references was related to a pedagogical interest of avoiding disruption from religious debate and of disassociating the school from a religious viewpoint (A-31, -32).

Petitioner appealed this judgment to the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment in an opinion and judgment entered October 12, 2004. In its opinion, the Court of Appeals rejected the idea that the mural project was a public or limited public forum. It determined that the school had retained editorial control over the murals because (1) Respondent Harris instructed that a mural not be profane or offensive, (2) Roberts was supposed to supervise the project, and (3) even though Respondent Harris told students they

[1] A claim also was asserted against Joe Sabia, coach of the high school's girls basketball team, but the parties stipulated to a dismissal of this claim.

should express themselves, he never said the murals were a forum for expressing religious or political views (A-8).

Because no public forum was involved, the Court of Appeals concluded that the murals constituted school-sponsored speech, and any restriction on that speech had to be judged under the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). It recognized that the *Hazelwood* decision establishes the standards for judging restrictions on student speech only where the expression occurs in the context of a "curricular activity."(A-10). Opining that this Court has defined "curricular activity" "broadly" (A-10), the Court of Appeals held that the mural project was a curricular activity because (1) Harris and Roberts supervised the project, and (2) "the beautification project was designed to impart particular knowledge and skills to student participants and audiences[.]" (A-11).

The Court of Appeals then rejected the Petitioner's claim that the Respondents' conduct constituted viewpoint discrimination. Although it agreed with the Petitioner that *Hazelwood* does not authorize the censorship of expression on the basis of viewpoint (A-12), it determined that the censorship at issue here was content-based, not based on viewpoint (A-12). Sharah's murals were "inherently religious messages," and "[s]ince the school did not permit any student in the context of a curricular activity to communicate such messages, it restricted speech on the basis of content, not viewpoint." (A-14, -15). The Court concluded that the school's censorship of Sharah's murals was reasonably related to a legitimate pedagogical interest in avoiding disruption of the school's learning environment, and so did not violate the First Amendment (A-15).

In a concurring opinion, Judge Black expressed disagreement with the majority's conclusion that the censorship of Sharah's murals was not viewpoint discrimination. Judge Black wrote that this Court's decisions in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), "compel us to conclude that this was an instance of viewpoint-based discrimination, not content-based discrimination." (A-17). However, Judge Black agreed with the result reached by the majority, reasoning that viewpoint-based discrimination is allowed when school-sponsored speech is involved (A-22).

Petitioner timely filed a petition for en banc review, but the request for rehearing was denied (A-24).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON WHETHER VIEWPOINT DISCRIMINATION IS JUSTIFIED WITH RESPECT TO SCHOOL-SPONSORED SPEECH.

The crucial determination of the Court of Appeals allowing it to reject the Petitioner's First Amendment claim was that the Respondents did not engage in viewpoint discrimination when they required Sharah to remove religious references from the murals she painted. Significantly, the appellate panel was not unanimous on this point; Judge Black found that this Court's decisions in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches*

Union Free School District, 508 U.S. 384 (1993), require a conclusion that the censorship was viewpoint discrimination. Had Judge Black's view on this point prevailed, the court below would have ruled in favor of the Petitioner because it also determined that viewpoint discrimination is not allowed, even if the speech involved is deemed "school-sponsored" speech under the decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). (A-12).

Selective censorship of religious messages is certainly viewpoint discrimination under this Court's precedent. In *Rosenberger*, 515 U.S. at 829, this Court wrote that "viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger* found such discrimination inherent in a University rule that denied funding to student publications that were written from a religious editorial perspective. The decision rejected the argument that the rule barred funding of any speech on religion and so was an allowable "content-based" restriction. *Id.* at 831-32.

In concluding that the censorship of the murals was an allowable content-based restriction on speech, the Court of Appeals did not even consider this Court's most recent decision on viewpoint discrimination in this context, *Good News Club v. Milford Central Schools*, 533 U.S. 98, 106-07 (1999). *Good News* held that the free speech rights of a Christian organization were violated by a school's refusal to allow the organization to hold meetings in the school pursuant to a policy which opened the school for use by civic and social groups. Significantly, the district court in

that case had held that the organization's rights had not been violated because its meetings were decidedly religious in nature "and not merely a discussion of secular matters from a religious perspective[.]" *Good News Club*, 533 U.S. at 104-05. Reversing the judgment of the district court and the court of appeals, this Court pointed out that the important point was not that there was some discrete secular issue to be discussed by the club, but that the club's meetings were an activity that fell within the purposes for which the school had been opened. That purpose was to allow civic groups to conduct events "pertaining to the welfare of the community." *Id.* at 108. Because it was clear that the club taught moral and character development to children, it qualified under the policy for use of the school and could not be excluded from the school because of the religious subject-matter of its meetings.

This Court went on to reject the lower courts' conclusions that excluding the club from the forum was justified because of the "quintessentially religious" nature of the club and made clear that such exclusion was unconstitutional viewpoint discrimination, writing as follows:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.... What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or

> patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.

Id. at 111-12.

The Court of Appeals' conclusion that the censorship of Sharah's murals did not constitute viewpoint discrimination relied upon the very arguments rejected in *Good News Club* and *Rosenberger*. The decision below held that the Respondents engaged in permissible content-based regulation of expression because all religious speech was prohibited and the mural did not involve expression on a secular topic from a religious viewpoint (A-14, -15). But the murals painted by Sharah were appropriate to and satisfied the purpose of the mural project, which was beautification of the unsightly wood panels and individual expression by students. The murals were censored by the Respondents

because the beautification and expression were from a religious viewpoint. Simply because all religious expression was forbidden does not make the restriction any less a restriction based upon viewpoint, as is made clear by the *Good News* and *Rosenberger* decisions.

To support its holding that the censorship here was content-based, the Court of Appeals relied upon a portion of the *Rosenberger* opinion, 515 U.S. at 831, in which the majority noted that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." From this, the Court of Appeals reasoned that a total restriction on expression addressing religion would not be viewpoint discrimination. But this Court disavowed that very conclusion in *Good News*, 533 U.S. at 110, writing that "[a]lthough in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor" in finding that there was viewpoint discrimination.

The panel's reasoning that there was no viewpoint discrimination because the murals did not involve discussion of a secular topic conflicts with the holding in *Good News Club*, a decision which is not addressed in the Court of Appeals' decision. *Good News Club* found viewpoint discrimination, even though no discrete secular topic was opened for discussion. Similarly, Sharah's murals addressed the subject of the mural project established by the school. The censorship of those murals because of their religious content constituted regulation of expression based on "the specific motivating ideology or opinion or perspective of the speaker [.]" *Rosenberger*, 515 U.S. at 829. This is patent discrimination forbidden by this Court's decisions culminating in *Good News Club*.

Viewpoint discrimination is clearly a violation of the First Amendment when it occurs in a public forum. However, the Courts of Appeal are split on whether viewpoint discrimination is allowed where the expression constitutes school-sponsored speech. Compare *Fleming v. Jefferson County School District*, 298 F.3d 918 (10th Cir. 2002), *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167 (3d Cir. 2003), *affirmed on other grounds*, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied, Hood v. Milford Township Board of Education*, 533 U.S. 915 (2001), with *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001), and *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999). That split is illustrated by the division among the panel of the Eleventh Circuit that decided this case, as Judge Black's concurrence argued that viewpoint discrimination is allowed in the case of school-sponsored speech (A-22). This concurrence conflicts with a decision from the Eleventh Circuit, *Searcy v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989), which held that *Hazelwood* did not intend "to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views[.]"

The instant petition for a writ of certiorari should be granted to remove any confusion and make plain that viewpoint discrimination is prohibited by the First Amendment, even if the speech is considered school-sponsored speech under the guidelines of *Hazelwood*. *Hazelwood* itself surely does not condone viewpoint discrimination; that decision never indicates that schools can censor on the basis of viewpoint. As noted in *Searcy*, 888 F.2d at 1324-25 (citing *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 812-13 (1985)), *Hazelwood* does not offer any justification for allowing educators to discriminate on

the basis of viewpoint. "The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis.... Without more explicit direction we will continue to require school officials to make decisions relating to speech which are viewpoint neutral."

The bar on viewpoint discrimination also is implicit in the *Rosenberberger* decision. The university argued there that, under *Widmar v. Vincent*, 454 U.S. 263 (1981), it was entitled to make content-based determinations on how it allocates resources through funding because the subsidized speech was that of the university. While this Court conceded that a university may make content-based distinctions when it is speaking for itself or subsidizing others to speak for it,

> It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

Rosenberger, 515 U.S. at 834.

Courts that allow viewpoint discrimination with respect to school-sponsored speech give insufficient weight to this Court's admonition that viewpoint discrimination is a

particularly "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. Thus, the decisions of the Third and Tenth Circuits that *Hazelwood* authorizes viewpoint discrimination as to school-sponsored speech is based on the fact that *Hazelwood* "makes no mention that the school's restriction must be neutral with respect to viewpoint[.]" *Fleming*, 298 F.3d at 928. *Cf. C.H.*, 195 F.3d at 172. Surely the authorization to engage in "egregious" viewpoint discrimination should not arise by implication from what this Court did *not* write.

This case presents the opportunity for this Court to make clear that viewpoint discrimination is intolerable and not justified simply because it is school officials who engage in such discrimination at the expense of students. Schools must not be allowed to selectively censor expression because the point of view of that expression is one of which individual officials disapprove. It is precisely that kind of censorship that occurred in this case, and a writ of certiorari should issue to firmly establish that such censorship is not tolerated by the First Amendment.

II. THE MURALS DID NOT CONSTITUTE SCHOOL-SPONSORED SPEECH SUBJECT TO CENSORSHIP UNDER THE STANDARDS OF *HAZELWOOD*.

The Court of Appeals also erred in holding that the Respondents' actions were to be judged under the standards established by *Hazelwood*. Sharah's murals did not constitute "school-sponsored" speech for purposes of *Hazelwood* because the murals were not part of the school's "curriculum." Thus, this is not a situation where the school

had greater leeway in regulating student speech because it was promoting the speech as held by the decision below.

In *Hazelwood*, this Court held that educators have greater authority to control "school-sponsored" expressive activities. "These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, *so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*" The Court went on to write that "[e]ducators are entitled to exercise greater control over this ... form of student expression to assure that participants *learn whatever lessons the activity is designed to teach*, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271 (emphasis added).

Thus, the essential aspect of a program that makes it "curricular" or part of a school's "curriculum" is that it relates to or is meant to impart instruction to students. Nothing in the facts of this case indicates that the project to paint the barriers in the school was intended to be instructional or impart knowledge or skills to students. The panel decision recognized that the project was intended to beautify the school (A-2). Other evidence shows that the project was meant to afford an expressive outlet for students.

The only support offered by the panel decision for its ruling that this project was a "curricular activity" is its conclusion that *Hazelwood* defined that term "broadly" and did not limit its application to activities which take place in a classroom. But this Court never held in *Hazelwood* that

"curricular" should be construed or applied broadly. To the contrary, *Hazelwood* held that an activity must be "designed to impart particular knowledge or skills to student participants and audiences" in order for expression during that activity to be considered school-sponsored. 484 U.S. at 271.

In an attempt to fit the mural project within the *Hazelwood* decision, the panel wrote that the project was designed to impart particular knowledge and skills because "it allowed student participants to express themselves artistically, allowed student audiences to appreciate their fellow students' artwork, and promoted school spirit, among other things." (A-11). This passage fails to identify any knowledge or skills that were imparted by the school or its teachers to the project participants in the course of this project. Indeed, and notwithstanding that a member of the faculty was appointed to supervise the project, students worked on their own in painting the murals and were not actually supervised or guided by school officials in how the artwork was accomplished or given instruction on any techniques. The only purposes identified by the Court of Appeals, or apparent from the record, are expression by students and beautification. There is no indication that the project involved imparting knowledge or skills by educators to students.

Thus, the decision below conflicts with the *Hazelwood* as to what activities are a part of a school's "curricular activities." Because the mural project was not part of the school's curriculum, the expression involved was not subject to suppression or censorship under the test established by *Hazelwood*, which requires only that the restriction be reasonably related to some pedagogical interest. *See*

Demmon v. Loudoun County Public Schools, 342 F. Supp. 2d 472, 489-90 (E.D. Va. 2004) (school program allowing students and parents to purchase bricks inscribed with messages for installation as walkway at high school was not related to school's legitimate pedagogical interest; program was not designed to impart skills or knowledge to students).

The Court of Appeals should have, at the very least, applied the more rigorous test applicable to speech in a limited public forum. It rejected this analysis because it determined that the school had not intentionally opened a nontraditional forum for public discourse (A-7). But the record in this case demonstrates that the school had designated this project as one open to all students and school staff and that there could be free and open expression. The project was conducted as a fundraiser by the Student Council. Any students or staff members who paid a small fee were permitted to express themselves freely in their artwork on the construction walls. The only limitations on the students' expression were that their artwork could not be profane or "offensive to someone." There were no limitations on the subject matter of students' artwork other than these instructions, and students were told that the expression was to be their own.

The panel decision held that these limitations were the same kind of editorial control involved in the *Hazelwood* case and so negated the creation of a forum for expression (A-7) (citing *Hazelwood*, 484 U.S. at 268). But *Hazelwood* involved far greater control than the restraints imposed upon students who chose to participate in the mural project. This Court stressed in *Hazelwood* that the expression at issue in that case occurred within the educational curriculum and was part of a regular classroom activity. Moreover, that

decision pointed out that it was clearly understood that any matters to be published in the school newspaper were subject to prior approval by the teacher in charge of the journalism course, Mr. Stergos:

> For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." . . . Moreover, after each *Spectrum* issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication.

Id. at 268-69.

There was no history of this kind of restraint upon expression with respect to the mural project at issue here. To the contrary, students were informed that they were free to express themselves. Also, there was no effort made by Cathy Roberts, the teacher supervising the project, or Principal Harris to screen or pre-approve the murals. Unlike the situation in *Hazelwood*, students were not required to

submit their mural projects to a school official or employee before they could begin painting. School officials did not seek to control the expression by Sharah until they discovered that the expression invited by the school contained a religious message. *See also Demmon*, 342 F. Supp. 2d at 482-83 (school program allowing students and parent to purchase bricks inscribed with messages for installation as walkway at high school was a limited public forum where school intended that purchasers would be allowed to express themselves; removal of bricks with religious symbols constituted viewpoint discrimination by the school).

Thus, the mural project was not a nonpublic forum, but, at the very least, a limited forum for expression by school students and staff. As such, the school could not suppress speech on the basis of its viewpoint. *Good News Club*, 533 U.S. at 106-07. As discussed in Part I, *supra*, it cannot be doubted that Sharah's murals were censored because of their religious messages, which is quintessential viewpoint-based suppression. *Rosenberger*, 515 U.S. at 829. Judge Black wrote in her concurring opinion below to the panel decision that the decisions in *Rosenberger* and *Lamb's Chapel* "compel us to conclude that this was an instance of view-point based discrimination[.]" (A-17).

Indeed, because this case involves student speech that was not in the course of a curricular activity, the more stringent standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), could have been applied by the courts below. Under *Tinker*, 393 U.S. at 509, a restriction on student speech is valid only if the speech would materially and substantially disrupt the operation of the school or discipline at the school. It is not proper for school officials to censor student expression because of a

desire to avoid a controversy which might result from the expression. *Id.* at 510. A desire to avoid controversy was precisely the basis for the censorship in this case.

Although the courts below referred to the fact that a "commotion" was caused by the murals (A-3), neither court found that there was a material or substantial disruption of the school's operations. Moreover, school officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.* at 509. Allowing the disagreements and objections of a few to be the justification for suppressing speech would grant a "heckler's veto" over expression that is inconsistent with established First Amendment principles. *Good News Club*, 533 U.S. at 119 (citing *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Because the Court of Appeals erred in holding that this viewpoint discrimination was justified under *Hazelwood*, its judgment must not be allowed to stand. A writ of certiorari should issue to vindicate the First Amendment rights of the Petitioner and prevent the use of the Court of Appeals decision in this case as justification for further acts of viewpoint discrimination.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Honorable Court grant the Petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in this case.

Respectfully submitted,

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In The
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a body corporate, and ED HARRIS, individually
and in his capacity as principal of
Boca Raton Community High School,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-13011

FILED
U.S. COURT OF APPEALS
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D.C. Docket No. 02-80438-CV-DTKH

SHELDA HARRIS BANNON, as parent and natural guardian of her daughters Sharah Harris and Brittni Harris,

Plaintiff-Appellant,

versus

SCHOOL DISTRICT OF PALM BEACH COUNTY, a body corporate, ED HARRIS, individually and in his capacity as principal of Boca Raton Community High School, JOE SABIA, individually and in his capacity as Girl's Basketball Coach of Boca Raton Community High School,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 12, 2004)

Before BLACK, BARKETT and MAGILL[2], Circuit Judges.

PER CURIAM:

Appellant Shelda Harris Bannon, on behalf of her daughter Sharah Harris, alleged that Appellees, School District of Palm Beach County and Principal Ed Harris, violated Sharah's First Amendment rights by compelling her to remove religious words and symbols from murals painted for a school beautification project. The district court granted summary judgment for Appellees because it concluded (1) Appellees never created a public forum, (2) the murals were school-sponsored speech, and, (3) Appellees' response was reasonably related to legitimate pedagogical objectives. We affirm.

I. BACKGROUND

This litigation concerns a school beautification project at a religiously diverse public school. While the school was undergoing long-term remodeling, students were prevented from walking into construction areas by dozens of large plywood panels in interior and exterior hallways. These panels were ugly, and would remain a part of the school for up to four years. To beautify the school, students were invited to paint murals on the panels. The school did not specifically prohibit students from expressing religious views. The school did, however, instruct students that their artwork could not be profane or offensive to anyone.

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[2] Honorable Frank J. Magill, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Sharah, a high school senior and member of the Fellowship of Christian Athletes (FCA), decided to participate in this beautification project. Although Sharah and her FCA colleagues planned to use verbal messages and religious symbols, they never gave Principal Harris or Cathy Roberts (the teacher supervising the beautification project) any notification or advance warning. No other student murals had verbal messages. On a Saturday afternoon, Sharah and other FCA students painted several murals with various religious messages and symbols.

Three of these murals were most notable. Sharah's first mural was next to the school's main office, had a crucifix in the background, and paraphrased *John* 3:16 as "Because He ♥ed, He Gave." Sharah's second mural was only a few panels down from the office and read, "Jesus has time for you; do you have time for Him?" Sharah's FCA colleagues painted a third mural, located in a main hallway, that read, "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God."[3]

The following Monday morning, Principal Harris found a commotion on campus near Sharah's murals involving vocal students and teachers. Later that day, the murals received media attention in the form of phone calls, reporters from three television stations, and newspaper reporters. This publicity and controversy distracted the attention of students, teachers, and administrators from schoolwork, teaching, and administrative duties. As Principal Harris explained in his deposition, the expression

[3] We refer to these three murals collectively as "Sharah's murals" or "the murals."

in Sharah's murals interfered with the operation of the school,

> because if it takes any time away from the productivity of the school in itself and the length of time that I had to spend on this, taking the principal's time, the assistant principal's time, the student's time away [from] the main focus of the school, . . . [so] the school was focusing more on the panels, overall, more so than [it] was focusing on the reason we were here.

Principal Harris did not expel, suspend, or otherwise punish Sharah for painting her murals. Instead, Principal Harris spoke about the murals with Ms. Roberts. Shortly thereafter, Ms. Roberts invited Sharah to step outside of class to speak privately. During this discussion, Ms. Roberts explained that although Sharah would need to paint over the overt religious words and sectarian symbols on all three murals, such as "Jesus," "God," and the crucifix, her other images and messages could remain. During her deposition, Sharah conceded this selective deletion was an attempt to keep her happy. Sharah repainted her murals and the FCA murals after school. Notably, Sharah was not the only student whose mural was edited. Principal Harris directed the removal of profanity, gang symbols, and satanic images from students' murals.

Appellant filed suit,[4] but the district court granted summary judgment for Appellees on the First Amendment

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[4] Appellant alleged claims on behalf of both her daughters, Sharah and Brittni. On behalf of Brittni, Appellant alleged a Title IX

claims because it concluded Appellees did not create a public forum. Instead, the district court reasoned the beautification project fell "squarely in the category of school sponsored speech." Applying *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which governs school-sponsored expression, the district court held Principal Harris's restrictions were "reasonably related to [the] legitimate pedagogical goal[s of] . . . . disassociating [the school] from religious organizations and the endorsement of religious views . . . . [and] avoiding disruption [to the learning environment] from religious debate on the walls of the school."[5] Appellant appealed.

II. DISCUSSION

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violation against Brittni's basketball coach. On behalf of Sharah, Appellant alleged violations of the First Amendment, as applicable to the states through the Fourteenth Amendment of the U.S. Constitution, via 42 U.S.C. § 1983, and the Florida Constitution's free exercise, free speech, and equal protection clauses. Appellant voluntarily dismissed her Title IX claims on behalf of Brittni, and does not argue on appeal that Appellees acted in violation of the Florida Constitution. Accordingly, our review is limited to the district court's denial of Appellant's First Amendment claims.

[5] *Hazelwood* involved a principal's decision to delete two articles from a high school newspaper, which was written and edited by a journalism class. 484 U.S. at 262-64. One article described several students' experiences with pregnancy, while the other discussed the impact of divorce on students at the school. *Id.* The principal believed the articles were inappropriate for publication because (1) despite the use of pseudonyms, the pregnant girls might be identifiable, (2) references to sexual activity and birth control were inappropriate for younger students, and (3) the divorce story did not give the interviewed students' parents an opportunity to respond or consent to publication. *Id.* The *Hazelwood* Court upheld the restrictions in the face of a First Amendment challenge. It concluded that the articles were school-sponsored speech and that the restrictions were reasonably related to legitimate pedagogical concerns. *Id.* at 273-76.

Appellant first contends the district court erred because it did not subject the school's action to the First Amendment standards applicable in designated or limited public fora. Alternatively, even if the district court properly concluded Appellees did not create a public forum, Appellant contends the district court improperly applied *Hazelwood*, 484 U.S. at 273 (holding schools may restrict school-sponsored expression so long as the restriction is "reasonably related to legitimate pedagogical concerns"). Appellant maintains *Hazelwood*'s standards do not apply when (1) the expression occurs during a noncurricular activity, or (2) the school's censorship of expression amounts to viewpoint discrimination. In lieu of applying *Hazelwood*, therefore, Appellant suggests the district court instead should have applied the rigorous standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969) (holding schools must tolerate pure student expression unless censorship is "necessary to avoid material and substantial interference with schoolwork or discipline"). We review the district court's grant of summary judgment de novo. *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990). For the reasons that follow, we affirm.

A. *Public Forum Analysis*

For First Amendment purposes, there are three kinds of government property: (1) traditional public fora, (2) designated public fora, and (3) nonpublic fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). In this instance, because the mural project was neither a traditional nor a designated public forum, it was a kind of nonpublic forum.

The mural project was not a traditional public forum. "[P]ublic schools do not possess all of the attributes of streets, parks, and other traditional public forums that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hazelwood*, 484 U.S. at 267 (internal quotation marks and citations omitted).

Neither was the mural project a designated public forum. "The government does not create a public forum by inaction or by permitting limited discourse, but *only by intentionally opening a nontraditional forum for public discourse.*" *Id.* (emphasis added; citations and internal quotation marks omitted). Indeed, a school creates a designated public forum only when "school authorities have by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Id.* (internal quotation marks and citations omitted). When a school retains editorial control over a forum, it has not created a designated public forum. *See id.* at 268 (concluding that a school newspaper was not a public forum because school authorities retained ultimate editorial control over production, publication, and content).

Far from "intentionally" opening a public forum for "indiscriminate use," Appellees merely solicited students to participate in a school beautification project. No record evidence demonstrates Appellees evinced an *intention*, "by policy or practice," to designate the school beautification project as a public forum in which students or anyone else could freely express any and all of their political, religious, or other views. Instead, Appellees always retained editorial control over the murals in at least three ways. First, Principal Harris explicitly instructed students that none of the murals

could be profane or offensive. Second, the mural project was supervised by Ms. Roberts, a faculty member. Finally, although Principal Harris told students to express themselves, he never said the murals were a forum for expressing their political or religious views. Thus, we conclude Sharah's expression did not occur in a traditional or designated public forum.

For these reasons, the district court correctly held Sharah's expression occurred in a nonpublic forum.

B. *Scholastic Nonpublic Fora*

Generally, in nonpublic fora, the government can regulate expression so long as its regulations "are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). In school settings, however, the analysis is slightly more refined based on the identity of the speaker and the nature of the expression. Within scholastic nonpublic fora, there are four clear categories of expression: vulgar expression, pure student expression, government expression, and school-sponsored expression.

Vulgar expression is student expression that is lewd, offensive, or indecent, and schools may freely curtail it. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 685 (1986). Pure student expression is student expression that merely happens to occur on the school premises, and schools must tolerate such expression unless they can reasonably forecast that the expression will lead to "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Government expression is expression delivered

directly through the government or indirectly through private intermediaries, and the government is free to make subject-matter-based choices. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Finally, between the spectrum of pure student expression and government expression is the intermediate category of school-sponsored expression: when "students, parents, and members of the public might reasonably perceive [students' expressive activities] to bear the imprimatur of the school," schools may censor student expression so long as their actions are reasonably related to legitimate pedagogical concerns. *Hazelwood*, 484 U.S. at 271-73.

1. *The Imprimatur Test and Curricular Expression*

The district court concluded Sharah's murals were school-sponsored expression, and consequently applied *Hazelwood*. Appellant argues this was error. Citing this Court's opinion in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), Appellant contends *Hazelwood* only applies to expression that occurs in the context of curricular activities, as opposed to noncurricular activities. In other words, even if expression is sponsored by or bears the imprimatur of the school, Appellant argues *Hazelwood* only applies when the expression occurs in the context of curricular activities. To complete this argument, Appellant maintains the beautification project did not occur in the context of a curricular activity because (1) Appellees did not require students to participate, (2) students received no grade or credit for participation, (3) the murals were painted on a Saturday outside of regular school hours, and (4) students paid a small fee to participate. As such, Appellant argues Appellees' policy was subject to the rigorous standards of *Tinker*, rather than the standards of *Hazelwood*.

We agree *Hazelwood* only controls school-sponsored expression that occurs in the context of a curricular activity, but conclude Sharah's murals occurred in such a curricular context. Thus, the murals constituted school-sponsored expression within the meaning of *Hazelwood*.

Hazelwood controls all expression that (1) bears the imprimatur of the school, and (2) occurs in a curricular activity. *Hazelwood*, 484 U.S. at 271-73; *Searcey*, 888 F.2d at 1319 n.7. Here, there is no question students, parents, and other members of the public might reasonably believe Sharah's murals bear the imprimatur of the school. The murals appear in prominent locations in the school. The first mural is next to the school's main office, the second mural also is near that office, and the third mural appears in a main hallway. Given the location of these murals, a reasonable "observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the [murals] it allowed to become a part of the school itself, which in this case, it did." *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 930 (10th Cir. 2002). More specifically, the beautification project was approved in advance by Principal Harris, advertised by the school, supervised by Ms. Roberts, limited to students and faculty who paid a fee to participate, and subject to the school's editorial control.

The real question is whether Sharah's expression occurred in the context of a curricular activity. In arguing Sharah's expression did not occur in the context of a curricular activity, Appellant underestimates how broadly the *Hazelwood* Court defined curricular activities. To be considered curricular, expressive activities need not occur in a "traditional classroom setting." *Hazelwood*, 484 U.S. at 271.

Instead, expressive activities are curricular so long as they are merely (1) "supervised by faculty members," and (2) "designed to impart particular knowledge or skills to student participants and audiences." *Id.* In contrast to Appellant's position, *Hazelwood* never defined curricular activity in terms of whether student participation was required, earned grades or credit, occurred during regular school hours, or did not require a fee.

Here, even though Sharah did not paint her murals in a traditional classroom setting, her expression still occurred in the context of a curricular activity. The first prong is met because Principal Harris and Ms. Roberts were faculty members who supervised the beautification project. Likewise, the second prong is satisfied because the beautification project was designed to impart particular knowledge and skills to student participants and audiences; it allowed student participants to express themselves artistically, allowed student audiences to appreciate their fellow students' artwork, and promoted school spirit, among other things. Appellant's arguments that Sharah's expression did not occur in the context of a curricular activity--because students were not required to participate, they received no grade or credit for participation, the murals were painted on a Saturday outside of regular school hours, and students paid a small fee to participate--simply have no toehold in the relevant legal doctrines. They ignore how broadly the Supreme Court has defined school curricula for *Hazelwood*'s purposes. As such, Sharah's expression occurred in the context of a curricular activity.

Sharah's expression bore the imprimatur of the school and occurred in the context of a curricular activity, so

Appellees can censor her expression subject to the limitations announced in *Hazelwood*.

2. *Viewpoint or Content Restriction?*

Appellant maintains that, although *Hazelwood* permits subject-matter-based restrictions on school-sponsored student expression, it does not permit viewpoint-based discrimination. We agree with Appellant that *Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint. *See Searcey*, 888 F.2d at 1325 ("[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint.") (emphasis in original).[6] In this case, however, the school did not engage in viewpoint discrimination, but rather censored the murals on the basis of their content. We reject the contention that *Rosenberger* and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), require us to view the school's actions here as a form of impermissible viewpoint discrimination. The school's refusal to allow Sharah, or anyone else, to make explicitly religious statements in murals that literally became

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[6] In *Searcey*, we addressed whether *Hazelwood* permitted viewpoint-based discrimination in a case brought by a nonstudent group, the Atlanta Peace Alliance (APA), that wanted to speak at a school's career day. 888 F.2d at 1315. The school did not let the APA speak. *Id.* We held the school could not exclude the APA from its career day, and stated that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325. Our conclusion in *Searcey* that *Hazelwood* does not permit viewpoint discrimination encompasses the sort of school-sponsored speech that was at issue in *Hazelwood*, which was student speech in a school-sponsored newspaper. *Hazelwood*, 484 U.S. at 273.

part of the school's walls is unlike the restrictions at issue in these cases.

Both decisions involved schools that prevented speakers from participating in a school-created forum because of the speakers' religious viewpoints. In *Lamb's Chapel*, a school board had a policy of allowing groups to use school property after-hours for a variety of social, civic, and recreational uses. 508 U.S. at 386. Regulations adopted by the board required that the "school premises shall not be used by any group for religious purposes." *Id.* at 387. Based on this regulation, the board refused a church group's request to screen a film series presenting a psychologist's "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 388-89. The Supreme Court found that the board's decision to deny access to the group constituted viewpoint discrimination, since the group was prevented from discussing the otherwise permissible topics of child rearing and family values because of the group's religious perspective. *Id.* at 393-94.

In *Rosenberger*, students at the University of Virginia sought and were denied funding for a "magazine of philosophical and religious expression" that addressed topics, such as racism, of daily importance to university students. 515 U.S. at 825-26. Because other student publications, without a religious perspective, were allowed to address these approved subjects, the Court held that the regulation amounted to viewpoint discrimination. *Id.* at 831-32. Importantly, the *Rosenberger* Court explained that the University did not restrict the subject matter of religion. *Id.* at 831. ("By the very terms of the [University's] prohibition, the University *does not exclude religion as a subject matter* but

selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.") (emphasis added).

Based on the above, we find both cases readily distinguishable from the facts of the current case. We note initially that neither *Lamb's Chapel* nor *Rosenberger* involved school-sponsored speech that could be attributed to the school. *Lamb's Chapel*, 508 U.S. at 395 (observing that "[t]he showing of this film series would not have been during school hours" and "would not have been sponsored by the school"); *Rosenberger*, 515 U.S. at 841 ("In this case, 'the government has not fostered or encouraged' any mistaken impression that the student newspapers speak for the University. The University has taken pains to disassociate itself from the private speech involved in this case.") (internal quotation marks and citation omitted). Despite the absence of school-sponsored speech in these cases, Appellant would have us adopt a reading of these decisions that would *require* a school, under the circumstances presented here, to allow students to use the walls of a public school to proselytize. In our view, neither case mandates such a result. Unlike the speech censored in *Lamb's Chapel* and *Rosenberger*, Sharah was not discussing secular topics from a religious perspective. Sharah's first mural (which included an image of a crucifix and the words "Because He Loved, He Gave.", based on *John* 3:16) referred to Christ's crucifixion. Sharah's second mural ("Jesus has time for you; do you have time for Him?") was a call for students to develop a personal relationship with Christ. The last mural by Sharah's colleagues ("God Loves you. What Part of Thou Shalt Not Didn't You Understand? God.") purported to be a message from God. These are obviously inherently religious messages, which cannot be recast as the discussion of secular

topics from a religious perspective. Since the school did not permit any student in the context of a curricular activity to communicate such messages, it restricted speech on the basis of content, not viewpoint.[7] Therefore, *Lamb's Chapel* and *Rosenberger* do not bar the school's non-discriminatory response to the controversy generated by Sharah's murals.

As explained earlier, a school's content-based censorship of school-sponsored student expression survives review under *Hazelwood* if it is reasonably related to legitimate pedagogical concerns. 484 U.S. at 273. Here, the district court correctly held that Appellees had a legitimate pedagogical concern in avoiding the disruption to the school's learning environment caused by Sharah's murals. *Fleming*, 298 F.3d at 934. Appellees' policy in prohibiting religious expression on its walls was reasonably related to this legitimate pedagogical concern because it ended the disruption. *See id.*

III. CONCLUSION

For the foregoing reasons, we conclude Sharah's murals were school-sponsored expression in a nonpublic forum subject to restriction under *Hazelwood* because they occurred in the context of a curricular activity, and students, parents, and members of the public might reasonably believe

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[7] As the *Rosenberger* Court explained, "the necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for . . . the discussion of certain topics." 515 U.S. at 829. This statement presupposes the legitimacy of content-based regulations in a limited public forum.

them to bear the imprimatur of the school. We hold Appellees' censorship of Sharah's school-sponsored murals was a reasonable content-based restriction that was rationally related to the legitimate pedagogical concern of avoiding the religious controversy and debate generated by Sharah's murals.

AFFIRMED.

BLACK, Circuit Judge, specially concurring:

I join the result reached by the majority decision. I write separately because I do not believe *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141 (1993) are as readily distinguishable from the present case as the majority. I think these cases compel us to conclude that this was an instance of viewpoint-based discrimination, not content-based discrimination. A finding of viewpoint discrimination, however, does not change the result in this case because *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), allows for viewpoint-based discrimination against school-sponsored student expression.

In *Hazelwood*, the Supreme Court addressed the First Amendment implications of a high school principal's excision of two pages worth of articles from a high school newspaper. In that case, a high school journalism class wrote and edited a school newspaper called *Spectrum*. *Hazelwood*, 484 U.S. at 262, 108 S. Ct. at 565. In one issue of the paper, two articles were scheduled to appear discussing student pregnancy and the impact of divorce on students. *Id.* at 263, 108 S. Ct. at 565-66. The principal objected to the publication of the articles because he believed, *inter alia*, that the material was not suitable for younger students. *Id.* at 263, 108 S. Ct. at 566. Accordingly, the principal cut the entire two pages on which these articles appeared. *Id.* at 263-64, 108 S. Ct. at 566. The Supreme Court held the school was not required to promote affirmatively this particular school-sponsored

student expression. It explained the school's decision was reasonably related to the legitimate pedagogical concern, among other things, of preventing the distribution of "frank talk" about girls' "sexual histories and their use or nonuse of birth control. . . . in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters." *Id.* at 274-75, 108 S. Ct. at 572. In reaching this conclusion, however, unlike the approach of typical nonpublic forum cases such as *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985), the Supreme Court did not clarify whether schools could make this decision solely on the basis of the student expression's subject matter, or also on the basis of the student expression's viewpoint.

In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), we examined whether *Hazelwood* permitted viewpoint-based discrimination in the context of school-sponsored non-student expression. There, the school refused to let a nonstudent group speak at the school's career day. *Id.* at 1315. We concluded the school's actions did not run afoul of *Hazelwood* and stated that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325.

Appellant, therefore, contends *Searcey* dictates that *Hazelwood* proscribes censorship of school-sponsored student expression on the basis of viewpoint. I disagree. On the contrary, *Searcey* does not control the instant situation because it did not involve school-sponsored *student* expression. Instead, *Searcey* involved a non-student outside group that wanted to speak at a school function. As such, *Searcey* merely stands for the proposition that when a school

has opened itself to outside speakers for some school-sponsored function, such as career day, it may not discriminate against the outside speakers' viewpoints. I am compelled to distinguish *Searcey* and conclude *Hazelwood* permits viewpoint-based discrimination against school-sponsored *student* expression for three reasons.

First, language in the *Hazelwood* opinion itself suggests schools may censor school-sponsored student expression on the basis of its viewpoint:

> A school must also retain the authority to refuse to sponsor *student speech* that might unreasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.

Hazelwood, 484 U.S. at 271, 108 S. Ct. at 570 (emphasis added; citations and internal quotation marks omitted). This language suggests schools may promote school-sponsored student expression that advocates certain views, while simultaneously censoring school-sponsored student expression that advocates contrary views. This is the epitome of discrimination based on viewpoint. We did not deal with student expression in *Searcey*; therefore we had no reason to address this *Hazelwood* language.

Second, despite *Hazelwood*'s silence on viewpoint neutrality, the majority of our sister circuits to consider the

question have held *Hazelwood* permits viewpoint-based discrimination. The First and Tenth Circuits have held *Hazelwood* permits viewpoint discrimination. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 928 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110, 123 S. Ct. 893 (2003); *Ward v. Hickey*, 996 F.2d 448, 453-54 (1st Cir. 1993). Only the Ninth Circuit has concluded *Hazelwood* does not permit viewpoint discrimination. *See Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (analyzing whether a censorship was viewpoint neutral, without first explaining whether *Hazelwood* requires viewpoint neutrality).

The majority rule of the First and Tenth Circuits better addresses the special situation of public schools by giving educators discretion to discriminate against school-sponsored student expression on the basis of viewpoint. As the Tenth Circuit explained, the *Hazelwood* Court's "specific reasons supporting greater control over school-sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with which messages a school chooses to associate itself, often will turn on viewpoint-based judgments." *Fleming*, 298 F.3d at 928. "No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint." *Id.* I agree. If viewpoint discrimination were forbidden, then a school that allowed a mural to say "God loves you. What part of thou shalt didn't you understand? God" might also have to allow a mural to say "Your God is dead. Long live Beelzebub." This would be an absurd result.

In contrast, the minority approach of the Ninth Circuit is not persuasive because it never explained why *Hazelwood* proscribes viewpoint-based discrimination. Indeed, a Ninth Circuit panel recently criticized the *Planned Parenthood* decision because, "despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000).

Third, as a policy matter, unlike other school-sponsored expression, school authorities need more discretion to control school-sponsored *student* speakers. Schools must not be "unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Hazelwood*, 484 U.S. at 272, 108 S. Ct. at 570 (citation and internal quotation marks omitted). Additionally, in the long run, this approach will promote more school-sponsored expression by giving school administrators more control over the viewpoint of such expression.[8] *See id.* at 276 n.9, 108 S. Ct. at 572 n.9

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[8] I caution, however, that when a school discriminates against expression on the basis of its viewpoint, it runs a greater risk of having its policy struck down for its failure to be reasonably related to legitimate pedagogical concerns. *See* Samuel P. Jordan, Note, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. Chi. L. Rev. 1555, 1573 (2003) (explaining schools should not allow viewpoint discrimination against school-sponsored expression to be justified "with just any pedagogical purpose"). For example, I would be hard pressed to find a school policy was reasonably related to any legitimate pedagogical concern if it sponsored student expression in favor

(suggesting that, if administrators were not given such control, schools would tend to silence all school-sponsored expression rather than allow uncontrolled school-sponsored expression); *Fleming*, 298 F.3d at 934 ("When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it."). If schools cannot control the viewpoint of the student expression they sponsor, there will likely be fewer school-sponsored student publications, student theatrical productions, student concerts, student speeches, or other expressive activities for students.

For these reasons, I conclude *Hazelwood* permits schools to discriminate against school-sponsored student expression on the basis of viewpoint.

A school's censorship of school-sponsored student expression survives review under *Hazelwood* if it is reasonably related to legitimate pedagogical concerns. 484 U.S. at 273, 108 S. Ct. at 571. Here, the district court correctly held Appellees had a legitimate pedagogical concern in avoiding disruption to the learning environment from religious debate erupting on school walls. *Fleming*, 298 F.3d at 934. I believe Appellees' policy in prohibiting religious expression on its walls was reasonably related to this legitimate pedagogical concern.[9]

---

of Republicans, but did not permit school-sponsored student expression in favor of Democrats, or vice-versa.

[9] Given my conclusion, there is no need for me to address Appellees' alternative argument that they had a legitimate pedagogical concern in avoiding an *Establishment Clause* violation.

Sharah's murals were school-sponsored expression in a nonpublic forum subject to restriction under *Hazelwood* - the murals were painted as part of a curricular activity and the public, as well as teachers and students, could have reasonably believed the murals bore the imprimatur of the school. Although Appellees censored Sharah's school-sponsored murals on the basis of their religious viewpoint, *Hazelwood* permits such viewpoint discrimination so long as the school's actions are reasonably related to legitimate pedagogical concerns. Here, the school's request that Sharah paint over certain parts of her murals was reasonably related to the school's interest in avoiding disruption to the learning environment caused by the reaction to the murals. Therefore, I conclude that the school's viewpoint-based discrimination, not content-based, was permissible under *Hazelwood*.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 09 2004
THOMAS K. KAHN
CLERK

No. 03-13011-HH

SHELDA HARRIS BANNON,
As parent and natural guardian of her daughters, Sharah Harris and Brittni Harris,

Plaintiff-Appellant,

versus

SCHOOL DISTRICT OF PALM BEACH COUNTY,
a body corporate,
ED HARRIS,
individually and in his capacity as principal of Boca Raton Community High School,
JOE SABIA,
individually and in his capacity as Girl's Basketball Coach of Boca Raton Community High School,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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Before: BLACK, BARKETT and MAGILL*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80438-CIV-HURLEY/LYNCH

SHELDA HARRIS BANNON, as parent and natural guardian of her daughters, SHARAH HARRIS and BRITTNI HARRIS,
Plaintiffs,

vs.
THE SCHOOL DISTRICT of PALM BEACH COUNTY, et al.

Defendants.
_____/

FILED BY ___ D.C.
MAY 12 2003
CLARENCE MADDOX
CLERK OF U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

ORDER GRANTING FINAL SUMMARY JUDGMENT

Plaintiff Shelda Harris Bannon, on behalf of her dauthter Sharah Harris, sues the School District of Palm Beach County ("the District") alleging that the District violated her constitutional rights under the free speech clause and free exercise clause of the United Constitution and the Florida State Constitution by directing Sharah Harris to delete the religious content of a wall mural which she painted as a student participant in a school beautification project at Boca Raton Community High School.

The case is now before the court upon the District's motion for summary judgment [DE #35]. Having carefully reviewed the parties memoranda of law and heard argument of counsel, the court has determined to grant the motion for reasons which follow.

Facts

In February, 2002, Sharah Harris was enrolled as a student in the 12th grade at Boca Raton Community High School ("Boca High"). At that time, the student government at Boca High hosted a school beautification project involving the painting of murals on wooden 4 x 8 construction panels erected as corridor dividers during a school reconstruction project. A faculty sponsor, Katherine Roberts, was assigned to oversee the mural project.

The school charged a five dollar ($5) fee to participate in the project. Sharah Harris voluntarily participated as a member of The Fellowship of Christian Athletes, a student club at the school, which paid the $5 participation fee. Ms. Harris painted her murals on a Saturday, choosing religious subjects: One contained bible verse and the words, "God Loves You. What Part of 'Thou Shalt Not' Don't You Understand? God." Another depicted the sun as background with a cross and the words "Jesus" and "God." According to Ms. Harris, she received some of these ideas from Coach Brandon Kornblue, one of the sponsors of the Fellowship of Christian Athletes, who had found the concepts on a website called "The God Signs."

In response to a concern over the religious content voiced by the faculty sponsor, the principal of Boca High, Mr. Ed Harris, directed Sharah Harris to delete the cross and words "God" and "Jesus" from her murals. Harris issued this directive pursuant to School District Policy 2.122 entitled "Religious Freedom" which promotes a policy of neutrality on religious matters, and to that end, prohibits the School

Board from sponsoring any religious activities or advancing any religious beliefs.

The plaintiff complains that the compelled excision of the cross and other religious references from her daughter's paintings interfered with their First Amendment rights of free speech and free exercise of religion. She brings this suit under 42 U.S.C. § 1983 to redress these alleged abridgements with compensatory and punitive damages as well as injunctive relief.[10]

Discussion

First Amendment protection over speech which occurs in a school setting divides into several compartments. First, there is "pure student expression " which is student speech that "happens to occur on the school premises," *Tinker v Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed. 2d 731 (1969)(black armband symbolic speech), expression which must be tolerated unless the school can reasonably forecast that the expression will lead to substantial disruption of or material interference with school activities." 393 U.S. at 514, 89 S. Ct. 733. Second, on the opposite end of that spectrum there is "vulgar," "lewd" and "plainly offensive" student speech governed by *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986), which may be freely curtailed.

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[10] Since Sharah Harris graduated from Boca Raton High School in 2002, her request for injunctive and declaratory relief to preclude future interference with student religious expression is moot. *Adler v Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997). Recognizing this limitation, the parties stipulated at oral argument that the plaintiffs' remaining claims are limited to money damages.

Third, there is private speech delivered on school property operating either as a public forum – under policy or practice of offering indiscriminate use to general public or segments of public such as student organizations – or as a "limited public forum" – where secular and non-secular groups are granted equal access to property for *after-hour* meetings. Here, the school retains no editorial control over speech content and the expression of religious beliefs may occur in a voluntary private group setting. *Compare Good News Club v Milford Central School*, 533 U.S. 98 (2001)(Bible Club's exclusion from after hour meetings based on religious content held unconstitutional viewpoint discrimination, where meeting privilege was extended to secular groups) *with Edwards v. Agilard*, 482 U.S. 578 (1987)(state "creationism act" requiring teaching of "creation science" in conjunction with evolution teaching held violative of Establishment Clause, where proposed expressive activity was to occur in classroom requiring mandatory attendance during school day). Fourth, there is government speech, delivered either directly or through private intermediaries – for example through a school principal – where the government is free to make content based choices. *Wells v. City & County of Denver*, 257 F.3d 1132, 1144 (10th Cir. 2001), *cert. den.*, 122 S. Ct. 469, 151 L.Ed.2d 384 (2001).

Finally, there is "school sponsored speech" which is student speech that a school affirmatively promotes, as opposed to speech that it tolerates, which included "expressive activities that other student, parents and members of the public might reasonably perceive to bear the imprimatur of the school" *Hazelwood School District of Kuhlmeier*, 484 U.S. 260 (1988), 108 S. Ct. 562, 98 L. Ed.2d 592 (1988). In this category of speech, the school may exercise

substantial editorial control as long as its actions are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, at 271-273, 108 S. Ct. 562. *See e.g. Santa Fe Independent School District v Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 (2000) (student initiated invocations before football games not protected under free exercise clause where invocations took place on school property during school sponsored event and might reasonably be perceive by audience as public expression of majority views delivered with school district's approval).

As a threshold matter, the court rejects the proposition that Boca High mural project occurred in a public forum. The project was not opened up for indiscriminate use by the general public or some segment of the general public. The District opened the project to its students, supervised the student painting sessions and actively screened out inappropriate murals.[11] By showing this affirmative intent to retain editorial control over the project, the District demonstrated that it did not intend to open the project for indiscriminate use by participants but instead reserved the project for its intended purpose of encouraging student participation in the beautification of school grounds. The court also rejects the proposition that the mural project occurred in a limited public forum because while the murals were was created during off hours, the proposed religious content of the murals would have been perpetually displayed and delivered during school hours to a captive audience of other students and teachers.

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[11] Prinicipal Harris testified that he also directed the deletion of several gang symbols and profanity which had been painted on other murals.

This project falls squarely in the category of school sponsored speech. Recognizing, under *Hazelwood*, that educators are entitled to exercise greater editorial control over student expression when it is elicited as part of a teacher supervised, school sponsored activity, the court finds that the District's restriction over the religious content of the subject painting represents a permissible exercise of that control. Plainly, the murals bore the "imprimatur" of the school, appearing as they did on 4 x 8 wood panels erected as temporary walls and corridor dividers during a school reconstruction project which has endured for an extended period of time, spanning over a year as of the time of oral argument, with an indefinite projected future term.

Although the painting occurred during off hours, the effects of the paintings were highly visible on corridor walls and passageways throughout the campus which other students were required to navigate during school hours. When coupled with the student government's sponsoring of the project, and the faculty supervision of that project, the school decision to thus display the murals conveyed a level of approval of the message, stamping the murals with the imprimatur of the school.

The analysis next turns to whether the District's restriction over this school sponsored speech in this case was reasonably related to a legitimate pedagogical goal The court recognizes that the environment in which learning takes place, such as a school's corridors, can be a pedagogical concern, and that the school's interest in disassociating itself from religious organizations and the endorsement of religious views within that environment is a legitimate one. In addition, the court recognizes a legitimate pedagogical interest in avoiding disruption from religious

debate on the walls of the school, which could be disruptive to the learning environment and and distract the school from its education al mission - concerns expressed by Principal Harris in defending his decision to control the religious content of the murals.

Other court have recognized these goals as legitimate interest which justify restrictions against public posting of religious speech on school property. *See Fleming v. Jefferson County School District*, 298 F.3d 918 (10th Cir. 2002), *cert. den.*, ---U.S.---, 123 S. Ct. 893 (2003)(tile painting and installation project established by district as part of school reconstruction after Columbine shootings constituted school sponsored speech over which school retained editorial control); *DiLoreto v Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir.1999), *cert. den.* 529 U.S. 1067 (2000)(district's desire to avoid "controversy and distraction created by political and religious messages on high school baseball field fence was reasonable where students were captive audience at school sponsored events). *Cf. Gernetzke v Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir. 2001), *cert. den.* 535 U.S. 1017, 122 S. Ct. 1606, 152 L. Ed. 620 (2002)(school principal's decision to forbid display of cross in mural painted by school bible club insulated from liability under Equal Access Act).

This court similarly concludes that the Boca High principal's restriction over religious symbolism in the mural project was reasonably related to the District's legitimate goal of preventing disruptive religious debate in the school corridors, and therefore constitutes a permissible restriction over the content of school sponsored speech.

It is accordingly

ORDERED and ADJUDGED:

1. The defendants' motion for summary judgment on the plaintiff's First Amendment claims for money damages [DE#35] is **GRANTED.**

2. The plaintiff's corresponding First Amendment claims for injunctive and declaratory relief are **DISMISSED** as **MOOT.**

3. Pursuant to stipulation of the parties, the unrelated claims on behalf of Shelda Harris Bannon, on behalf of her daughter Brittni Harris are **DISMISSED WITH PREJUDICE.**

4. There being nothing further for the court to do in this matter, the Clerk of Court is directed to **CLOSE** this file and deny any pending motions as **MOOT.**

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 10th day of May, 2003.

Daniel T. K. Hurley
United States District Judge

cc.
Sandra Bosso-Pardo, Esq.
William O. Solms, Jr., Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80438-CIV-HURLEY/LYNCH

SHELDA HARRIS BANNON, as parent and natural guardian of her daughters, SHARAH HARRIS and BRITTNI HARRIS,
Plaintiffs,

vs.
THE SCHOOL DISTRICT of PALM BEACH COUNTY, et al.,
Defendants. /

FILED BY ____ D.C.
MAY 12 2003
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA.-W.P.B.

FINAL SUMMARY JUDGMENT

THIS CAUSE came on for summary judgment before the court, and the court having duly rendered its decision, in accordance with Rule 58, Federal Rules of Civil Procedure, it is herewith

ORDERED AND ADJUDGED:

That **FINAL SUMMARY JUDGMENT** be entered against the plaintiff, SHELDA HARRIS BANNON, as parent and natural guardian of her daughter, SHARAH HARRIS who shall take nothing by this action, and in favor of the defendants. The SCHOOL DISTRICT OF PALM BEACH COUNTY, and ED HARRIS, individually and in his capacity as Principal of BOCA RATON COMMUNITY HIGH

SCHOOL, who shall go hence without day. The court reserves jurisdiction to award costs.

DONE and ORDERED in Chambers in West Palm Beach, Florida this 10th day of May, 2003.

Daniel T.K. Hurley
United States District Judge

Supreme Court, U.S.
FILED
JUN 8 - 2005
OFFICE OF THE CLERK

No. 04-1207

In the
Supreme Court of the United States

SHELDA HARRIS BANNON,
as parent and natural guardian of her daughters
Sharah Harris and Brittni Harris,
Petitioner,

v.

SCHOOL DISTRICT OF PALM BEACH COUNTY,
a body corporate, and ED HARRIS, individually
and in his capacity as principal of
Boca Raton Community High School,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents

QUESTION PRESENTED

As shown in this brief, the Court should deny the Petition as to all questions presented. Respondents additionally object to the content of Petitioner's questions because they impliedly mischaracterize the Eleventh Circuit's holding and they ignore important facts. Respondents submit the following replacement question, including relevant unique facts:

Did the Eleventh Circuit correctly decide that the Constitution, as interpreted in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permits a public high school principal to restore order to the school's disrupted learning environment by requiring minor edits to religious speech that a student had painted on large murals (upon semi-permanent construction-barrier panels owned by the school) near the main office and other high-traffic walkways for constant viewing by a captive audience of students for up to four years during reconstruction (as part of a school-sponsored beautification project coordinated by the student government/leadership class, approved by school administration, advertised by the school, regulated by the principal, and supervised by a teacher), when the religious speech was suggested or encouraged by two faculty members to be included without advance notice to the principal or supervising teacher, and these murals became the only ones to include verbal messages, when the project was intended for decoration rather than a forum for viewpoints; and disruption arose due to Establishment Clause concerns about the proselytizing sectarian religious speech bearing the imprimatur of the school?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, School District of Palm Beach County, Florida, and Ed Harris, request that the Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on October 12, 2004.

FACTUAL BACKGROUND

Respondents object to Petitioner's statement of the case, as it ignores details that militate against Petitioner's claim that principal Ed Harris—who in his private life was a Christian lay minister and Sunday School teacher (PD 95)[1]—censored school-sponsored proselytizing Christian messages based on his alleged "individual . . . disapprov[al]" of their Christian point of view. Pet. 13. In scholastic First Amendment cases the "hard task of judging . . . requires courts to draw lines, sometimes quite fine, based on the *particular facts of each case.*" *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (emphasis added). The details are set forth here, consistent with the statements of facts in the opinions below:

Disruption. — The principal of Boca Raton Community High School in Palm Beach County, Florida, encountered disruption on his campus on the morning of February 11, 2002. First he noticed a commotion involved several students and teachers in a walkway. Additionally, many phone calls were coming in to the principal. The source of the disruption was featured on the news that morning, with three television stations and the

[1] The notation "PD" refers to the principal's deposition in the record on file with the Eleventh Circuit.

newspaper having sent reporters. (PD 80, 81, 97.) The disruption took time away from "the productivity of the school in itself and the . . . principal's time, the assistant principal's time[, and] the student's time away [from] the main focus of the school . . . ." (PD 83.) There was much student discussion about the source of the commotion; it was distracting to the students and to the school's mission of educating the students. (PD 97–98.) Principal Harris heard rumors of other concerns from the students, faculty, and the public, and he took all of the debate as an indication that there was a controversy that would be disruptive to the school. (PD 48, 49, 51, 52, 83.)

Source of the Disruption. — There was substantial concern about an apparent Establishment Clause violation through bold proselytizing sectarian messages that had been painted over the weekend on several construction-divider panels in prominent locations near the main office and other high-traffic areas of the school.

The school was undergoing a long-term reconstruction project, and the contractors had erected about sixty (60) 4-foot by 8-foot flat-white plywood construction-divider panels in interior and exterior walkways throughout the school. (PD 31, 39; SD Ex. 2.)[2] Feeling that some colorful paintings would make the school more aesthetically pleasing, (PD 31), the student government/leadership class sponsored a beautification project, inviting students and teachers to paint 8-foot by 8-foot murals (each mural occupying two of the construction panels owned by the school), and the project was also a school fundraiser. (PD 40.) Petitioner described student government as a leadership class that students join by going "to the guidance counselor and ask[ing] for the class." (SD 9.)

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[2] The notation "SD" refers to Sharah Harris' deposition in the record on file with the Eleventh Circuit, and "Ex. 2" refers to Exhibit 2 of that deposition.

To seek approval of the project concept, the teacher/class sponsor Ms. Roberts first discussed it with Principal Harris, who advised that the school must "be careful what we do on the walls, because . . . you can't offend people by putting things on the wall" with anything "like gang-related information," or "discriminating against someone." (PD 31, 33, 41.) Ms. Roberts submitted an activities pre-approval form, which was approved by an assistant principal and Mr. Harris, and it was Ms. Roberts' responsibility to have the appropriate-content guidelines announced to the students. (PD 31–32; SD 7.)

Petitioner saw school announcements about the beautification project, inviting any student to assist the leadership class in painting the panels. (SD 6.) She was a member of the Fellowship of Christian Athletes ("FCA"), a student-initiated club that met before school once a week. (SD 10, 62.) Petitioner apparently invited fellow FCA members to participate with her. Petitioner personally painted two of the murals on a Saturday, February 9, 2002, and some other FCA members painted also. (SD 29, 41–48.) The panels themselves remained school property, under the ownership and dominion of the school before, during, and after the painting. (SD 108, 112.)

The beautification project was simply intended to supply artwork to decorate the plain white plywood panels. (PD 31.) But unlike other students' paintings, the murals painted by Petitioner[3] included verbal messages. (SD 78.) Petitioner conceded that her murals reflected more than artwork; they also exhibited a religious verbal message. (SD 139.) The FCA had devised this plan without notifying the administration. (SD 17–23.)

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[3] For convenience, the term "Petitioner" in this brief is used to refer to Sharah Harris (on whose behalf her mother Shelda Harris Bannon sued) and, unless the context requires otherwise, the term also encompasses some murals painted by other FCA members who joined or assisted Sharah in painting religious messages.

Suggested and Encouraged by Faculty Members. — Although the Petition characterizes the religious messages as student-initiated expression, such claim is vitiated by the fact that two faculty members had been involved with the selection of the religious messages; the FCA faculty sponsors had discussed the religious-message plans with Petitioner, and later the plan was presented to the FCA club, (SD 56), where one of the faculty sponsors encouraged them to carry out the plan with the intent of painting the religious messages on several murals in different areas in order to "have them all the way around the school." (SD 14, 17, 21.)

Further, Petitioner selected some of the messages from a document received from a faculty member at school. (SD 49–54.) A faculty member handed the list of suggested religious messages to Petitioner in the school hallway, suggesting she might find some of them useful for her mural. (SD 54.) The messages on the list named God, and Petitioner also added a suggestion using the name "Jesus." (SD 59.) The other FCA sponsor knew exactly what Petitioner was planning to paint and encouraged her to do so. (SD 17.)

Proselytizing Sectarian Messages. — Petitioner's first mural stated, "Because He loved, He Gave," paraphrasing John 3:16. The background had a cross in the middle, and the word "loved" was represented by a heart plus the letters "-ed." (SD 30.) Petitioner's second painting boldly proclaimed, "Jesus has time for you; do you have time for Him?" (SD 31.) Paintings by other FCA members (also referred to here as Petitioner's murals) included overt religious messages such as "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God," selected from the Petitioner's list. (SD 42–44.) In all, Petitioner's large murals used about eight instances of the word "God;" one instance of the name "Jesus," and three crosses, (SD 114); but none of the other murals in the project used any verbal messages.

Immediate Establishment Clause Concerns. — Ms. Roberts, the teacher who supervised the mural painting project, immediately became concerned about the appropriateness of Petitioner's unexpected content, apparently because of Establishment Clause concerns about the proselytizing religious messages, Pet. App. A-27, and she reported the issue to the principal that evening. (PD [illegible]–45.) Ms. Roberts felt that an FCA faculty sponsor had "sort of pushed the issue" of including religious messages on the murals. (PD 88.) In response, the principal suggested that they review the appropriateness of the murals together on Monday (the next school day). (PD 45.) That is when the principal discovered the disruption.

Effects of Disruption. — With all the controversy and commotion, less academic work got done that day than usual. (PD 85.) For example, in Petitioner's third-period math class, a substantial discussion ensued. "[I]t took a few [minutes] — 'cause some like wanted to say what they believe, and then a few other [students] wanted to say what they believed, and then [it] just kind of went on from there." When students posed questions to the teacher, "maybe he would try to answer it, and then he would come back to me . . . and have me answer it," Petitioner revealed. (SD 88–90.)

The principal recalled, "Every time I walked down the halls I had kids and teachers and all [saying], 'What's going on here,' you know. . . . It was related to the panels . . . ." (PD 96.) The principal clearly was concerned about the order and educational mission of the school if he had allowed the murals to remain unedited. He did not mind the messages personally, but "when it affects the entire school, . . . the institution that I am working in and have a responsibility for, I must uphold the rights of that institution" to a conducive learning environment. (PD 99.)

After a morning of commotion, the principal finally visited the student's fourth (last) period class to confer

discreetly with the teacher, Ms. Roberts, who had supervised the painting project. Although Principal Harris—as a devout Christian—had no personal distaste for the sectarian proselytizing religious messages, he was concerned about an apparent Establishment Clause violation; he mentioned to Ms. Roberts the requirement of "separation of church and school" (PD 68) and left it up to Ms. Roberts, as the project sponsor, to determine precisely which parts should be painted over. (PD 56–57.)

Reasonable, Least-Restrictive Editorial Control. — After Mr. Harris left, Ms. Roberts asked Petitioner to step outside for a moment, where Ms. Roberts explained the need to paint over the overt religious words and sectarian symbol ("Jesus," "God," and the cross) because of Establishment Clause concerns; but the remainder of the mural content (non-sectarian, non-proselytizing portions and pictures) was appropriately allowed to remain. (SD 92–93.) Ms. Roberts suggested reasonable, minor alterations to Petitioner, such as altering "Jesus has time for you; do you have time for Him" to the non-sectarian, "He has time for you; do you have time for Him." (SD 93.)

Petitioner performed the re-painting after school. (SD 129.) The re-painting apparently involved mostly other FCA-member students' murals; Petitioner was asked to do the repainting on them because she had been the FCA painting coordinator. (SD 41–48; 131.) (Notably, the principal had also directed the removal of several gang symbols, some satanic symbols, and some after-added profanity that had been painted on murals, (PD 47).) Although Petitioner was initially upset about having to modify a few portions of the murals, she admitted she was glad the principal had directed other students' satanic symbols to be removed, and she would be in favor of removing anything like drug-related speech, hate symbols, and gang symbols. (SD 80, 101.) Petitioner conceded the principal had no invidious motive in removing any of the religious expression. (SD 101–104.)

Before the summary judgment hearing in the district court, Petitioner had already graduated from high school and her claims for injunctive and declaratory relief were moot. The parties stipulated at the hearing that her remaining claims were limited to money damages under 42 U.S.C. § 1983. Pet. App. A-28 n. 10. The district court granted summary judgment for Respondents, finding that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988) allows schools to exercise editorial control over school-sponsored religious speech, with the "legitimate goal of preventing disruptive religious debate in the school corridors" and disassociating the school from a position other than neutrality on matters of religion. (Pet. App. A-31, 32.)

The Eleventh Circuit affirmed, finding the murals were curricular school-sponsored speech bearing the imprimatur of the school, over which substantial viewpoint-neutral content-based editorial control is allowed when reasonably related to legitimate pedagogical concerns under *Hazelwood*. The court recognized one of the legitimate pedagogical concerns was ending "the disruption to the school's learning environment caused by [Petitioner's] murals," and the editorial control was reasonably related to that goal "because it ended the disruption." *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1217 (11th Cir. 2004).

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN *HAZELWOOD*

Contradicting the courts below, Petitioner asserts that the beautification project was not school-sponsored speech under *Hazelwood School District v. Kuhlmeier*, 484

U.S. 260, 271 (1988). This assertion rests upon three erroneous arguments: 1) that the project was a public forum for unfettered expression of viewpoints; 2) that the *Tinker* disruption/interference standard should apply; and 3) that the beautification project was not "curricular." However, *Hazelwood* is the correct standard.

A. The Project Was a Scholastic Nonpublic Forum

The Eleventh Circuit analyzed the three kinds of government property and systematically rejected two of the three possibilities for the school's mural project: schools do not possess the qualities of traditional public fora; and the school had not intentionally opened a designated or limited public forum for indiscriminate discourse. *Bannon*, 387 F.3d at 1212–13, citing *Hazelwood*, 484 U.S. at 267, 270. The forum was therefore a nonpublic forum, consistent with the general rule that schools are nonpublic fora unless they have intentionally designated a public forum. *See, e.g., Grattan v. Bd. of Sch. Com'rs of Baltimore City*, 805 F.2d 1160, 1162–63 (4th Cir. 1986) (even a public school parking lot, after hours, is a nonpublic forum in which schools can regulate content).

The courts have interpreted *Hazelwood* as "constrain[ing] the [forum] analysis by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991) (citing *Hazelwood*, 484 U.S. at 270–73). The analysis must consider the school's "pedagogical concerns, such as . . . *disassociating itself from speech* inconsistent with its educational mission and *avoiding the appearance of endorsing views*, no matter who the speaker is." *Planned Parenthood*, 941 F.2d at 827 (emphasis added).

Nonpublic fora are not transformed into limited public fora when expressive activity simply happens to occur therein. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 805 (1985). Nor do school-sponsored projects become limited public fora simply "by permitting limited discourse, but only by *intentionally* opening a nonpublic forum for public discourse." *Hazelwood*, 484 U.S. at 267 (emphasis added).

Here, the school's mural project—planned by the student government/leadership class, approved and regulated by principal, advertised by the school, and supervised by a teacher—was intended to benefit the school by raising funds and making the construction panels bearable. There was no "clear intent to create a [limited] public forum" by "open[ing] the [panels] . . . to indiscriminate use . . . by the student body. . . . Instead, they reserved the [nonpublic] forum for its intended purpose" by seeking colorful art, by providing guidelines, and by supervising the project. *See Hazelwood*, 484 U.S. at 270 (citations and internal quotations omitted). As the *Bannon* court pointed out, the principal had never "said the murals were a forum for expressing [students'] political or religious views." 387 F.3d at 1213. Out of the many murals in the project, only Petitioner's used the opportunity to proclaim verbal messages. Such incidental expression did not transform the school-sponsored art project into a limited public forum. *Cf. Cornelius*, 473 U.S. at 805. The school's beautification project remained a scholastic nonpublic forum.

Of the several kinds of expression that may occur in a scholastic nonpublic forum, it is important to distinguish between two kinds for this case: school-sponsored speech versus pure student expression. Petitioner argues that the pure-student-expression standard should apply under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court, however, has explained the difference:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech [the *Hazelwood* school-sponsored speech standard]. The former question [in *Tinker*] addresses educators' ability to silence a student's *personal expression that happens to occur on the school premises* [and may cause disruption, interference, or disorder]. The latter question [in *Hazelwood*] concerns educators' authority over school-sponsored publications, theatrical productions, and *other expressive activities* that *students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.*

Hazelwood, 484 U.S. at 270–71 (emphasis added).

Here, the school-sponsored mural project plainly was not merely personal, private expression that just happened to occur on campus like a slogan on a student's shirt or a conversation between two students over lunch, subject to the *Tinker* standards. Rather, the school had organized, regulated, and supervised the project resulting in murals that would be part of the school for years.

B. The Murals Were School-Sponsored Speech Bearing the Imprimatur of the School

In spite of causing disruption like that which can be quelled even under the heightened *Tinker* standard as discussed in Part III.A below, the murals actually fit squarely within the *Hazelwood* framework of school-sponsored speech bearing the imprimatur of the school.

> [T]here is *no question* students, parents, and other members of the public might reasonably believe [Petitioner's] murals bear the imprimatur of the school. The murals appear in prominent locations in the school . . . [and] a reasonable observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the [murals] it allowed to become a part of the school itself. . . .

Bannon, 387 F.3d at 1214 (citation and internal quotes omitted).

C. The Mural Project Was a Curricular Activity

As relates to the curricular application of *Hazelwood*, two interpretations would appear valid: either school-sponsored speech includes any expression implicating pedagogical concerns and bearing the imprimatur of the school, or the term refers to a broadly-defined gamut of curricular activities.

The Tenth Circuit has held that "'school-sponsored' speech . . . mean[s] [any] activities that might reasonably be perceived to bear the imprimatur of the school and that involve *pedagogical concerns*." *Fleming*, 298 F.3d at 924. *Hazelwood* spoke of activities that "may fairly be characterized as part of the school curriculum." 484 U.S. at 271. *Hazelwood* emphasizes controlling "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" or other "vehicle of student expression," so that "views of the individual speaker are not erroneously attributed to the school." 484 U.S. at 271, 273. "Further, the *environment* in which learning takes place, such as the school's *hallways*, can be a pedagogical concern, as it affects the learning process." *Fleming*, 298 F.3d at 931

(emphasis added). The Tenth Circuit interprets *Hazelwood's* curricular language ("designed to impart particular knowledge or skills to student participants and audiences") to mean any "activities that affect learning, or in other words, affect pedagogical concerns," such as "the school district's desire to *avoid controversy within a school environment*." *Id.* 298 F.3d at 925–26 (emphasis added; citations omitted).

The Eleventh Circuit has taken a conservative approach, holding that school-sponsored speech refers to curricular activities, which are to be broadly defined. *Bannon*, 387 F.3d at 1214. Under either approach, the results are generally the same: the activity in question will often be subject to control under *Hazelwood*, regardless of whether it occurs in a classroom. Having taken the conservative view, the *Bannon* court explained:

> To be considered curricular, expressive activities need not occur in a "traditional classroom setting." *Hazelwood*, 484 U.S. at 271. Instead, expressive activities are curricular so long as they are merely (1) "supervised by faculty members," and (2) "designed to impart particular knowledge or skills to student participants and audiences." *Id.* In contrast to Appellant's position, *Hazelwood* never defined curricular activity in terms of whether student participation was required, earned grades or credit, occurred during regular school hours, or did not require a fee.

Bannon, 387 F.3d at 1214. Petitioner's expression certainly occurred in the context of a curricular activity:

> The first prong is met because Principal Harris and Ms. Roberts were faculty members who supervised the beautification project. Likewise, the second prong is

> satisfied because the beautification project was designed to impart particular knowledge and *skills* to student participants and audiences; it allowed student participants to express themselves *artistically* [similar to skills in art classes], allowed student audiences to *appreciate their fellow students' artwork*, and *promoted school spirit*, among other things.

Bannon, 387 F.3d at 1214–15 (emphasis added).

Additionally, the mural project was initiated and coordinated by a class (the student government/leadership class) and directly affected the learning environment. This project was one of *Hazelwood's "other expressive activities* that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *See* 484 U.S. at 271. It certainly was not merely extracurricular speech like discourse at a baseball game. Yet, *Hazelwood* has even been applied to a ball field fence. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000). *Hazelwood* plainly said such activities need not occur in a classroom setting. 484 U.S. at 271. There can be no doubt that "curricular activities" must be construed broadly under *Hazelwood*.

D. *Bannon* Is Consistent with the Viewpoint Doctrines of *Lamb's Chapel*, *Good News Club*, and *Rosenberger*

Contrary to Petitioner's claim that the Eleventh Circuit "did not even consider" *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), that decision was discussed in the district court's opinion and was briefed for the Eleventh Circuit by both parties. In both *Good News Club* and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the schools had

intentionally opened a limited public forum for temporary, after-school private use of meeting facilities by outside groups or extracurricular student clubs, which were not initated or coordinated by the school. In contrast to the private, temporary, extracurricular, after-school use of meeting facilities in *Good News Club*, the murals in *Bannon* were school-sponsored and became a semi-permanent part of the fabric of the building, to be seen daily by a captive audience during school hours. The Good News Club sought "to address *a subject otherwise permitted* under the rule, the teaching of morals and character, *from a religious standpoint*." 533 U.S. at 109. By contrast, the school in *Bannon* did not open a public forum for any viewpoints and had not made any topics includable; the project was for aesthetic beautification.

Bannon is also fully consistent with *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), which involved a "limited public forum . . . of [the university's] own creation," *id.* at 829, in which the university expressly solicited the views of a diversity of students in an extracurricular program that was separate and independent from the university, *id.* at 824, "to encourage a diversity of views from private speakers." *Id.* at 834. The university had intended to "open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity . . . of student life," *id.* at 840. Thus, the University's extracurricular student activity fund should have provided newspaper printing funds from the extracurricular student activity-fees fund on a "religion-blind basis." *Id.* at 845. By contrast, the beautification project in *Bannon* was school-sponsored speech in a *nonpublic* forum, and the school had not solicited student's viewpoints. The project was simply intended to decorate the plain construction-barrier panels; and none of the murals included verbal messages, religious or otherwise, besides the few panels painted by Petitioner.

The *Rosenberger* Court, at page 830, directly based its reasoning on *Lamb's Chapel*, 508 U.S. at 393, which held that schools that open a limited public forum by allowing private community groups to use school facilities after hours should provide the facilities (for private, extra-curricular, after-school use) without regard to the group's religious perspective on permissible topics; it would be viewpoint discrimination to allow "all *views* about family issues and childrearing *except* those dealing with *[that] subject matter from a religious standpoint*" (emphasis added). By contrast, in *Bannon* there were no permissible topics to be discussed from a religious standpoint; the murals were simply intended for beautification of the panels, and Petitioner's murals were the only ones that included viewpoints. *Bannon*, 387 F.3d at 1211.

The Petition mischaracterizes *Rosenberger* as treating any exclusion of religious speech as viewpoint discrimination. However, *Rosenberger* itself recognized that "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify . . . reserving it for . . . certain topics." 515 U.S. at 829. *Rosenberger* plainly distinguished between subject-based restrictions and viewpoint discrimination:

> When the government targets *not subject matter, but particular views* taken by speakers *on a subject*, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the *specific motivating ideology or the opinion or perspective* of the speaker *is the rationale* for the restriction.

Id. at 829 (emphasis added). Thus, *Rosenberger* "merely held that refusing to fund only religious viewpoints on *otherwise-permissible subjects* (i.e. pregnancy or homosexuality) was viewpoint discrimination." *DiLoreto v.*

Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999) *cert. denied*, 529 U.S. 1067 (2000). The rationale for the restriction in *Bannon* was not to suppress any "specific motivating ideology." The principal only desired to restore order to the learning environment, avoid further disruptive controversy, and avoid an Establishment Clause violation.

In sum, the *Good News Club* Court specifically found a club was discussing the permissible (secular) subjects of "morals and character development . . . from a particular [religious] viewpoint." 533 U.S. at 111–12. The Court went on to emphasize that its holding in that case and in *Lamb's Chapel* and *Rosenberger* were all the same: that "speech discussing *otherwise permissible subjects* cannot be excluded from a *limited public forum* on the ground that the *subject* is discussed *from a religious viewpoint*." *Good News Club*, 533 U.S. at 111-12 (emphasis added). *Bannon* is consistent with those cases because all three of those decisions clearly distinguished between permissible subject-matter restrictions as opposed to invidious viewpoint-based discrimination against certain perspectives on an allowable subject.

Bannon is also wholly distinguishable from those cases, however, because they involved an intentional public forum (and extracurricular activities), rather than *Bannon's* curricular, scholastic nonpublic forum. Because the beautification project was not intended to be a forum for expression or debate of various viewpoints, Petitioner's painting proselytizing verbal messages amounted to "controvert[ing] the rules of a structured [school] activity with the intention of promoting an unsolicited message," *cf. Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271, 280 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (as a means of sharing her faith—a conclusion supported by statements in the deposition. (SD 14, 17, 21, 64–65, 72–73, and 81–83.)) However, "a student's right to express [her] personal religious beliefs does not extend to using

the machinery of the state as a vehicle for converting [the] audience." *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999), *cert. granted and j. vacated*, 530 U.S. 1256 (2000), *op. reinstated*, 230 F.3d 1313, *cert. denied*, 533 U.S. 916 (2001).

E. The Editorial Control Was Based on Legitimate Pedagogical Concerns

This Court has held that "control over access to a nonpublic forum *can be based on subject matter* . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, (1985). "Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic." *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000). The principal in *Bannon* responded to an objective realization that the large, overt religious verbal messages and cross were of doubtful constitutional validity on a public school's walls and were causing a palpable disruption in the learning environment. Changing a few items (the words "God" and "Jesus" and the cross), was a narrowly-tailored way to render the religious messages non-sectarian and non-divisive. For example, "He has time for you" does not carry the sectarian impact of "Jesus has time for you."

The murals' potential for litigation and controversy was a valid concern justifying a response by the principal, especially given that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). In a case strikingly similar to *Bannon*, a school invited student clubs to paint murals in school hallways, but the principal

rejected certain designs, including a Latin cross and a swastika. The Seventh Circuit upheld the restrictions, noting that the principal's "reaction to the swastika, and to the naming of the brand of beer, in proposed secular murals shows that he was discriminating *not* against *religion* but merely against *displays*, religious or secular, *that lead to litigation or disorder*" or "might also require him to approve murals of a Satanic or neo-Nazi character, which would *cause an uproar.*" *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 466 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) (emphasis added).

Likewise, in *Bannon* the principal removed several kinds of symbols, both secular and religious, indicating that the principal was not discriminating against a Christian viewpoint, but rather against "displays . . . that lead to litigation and disorder." *See Gernetzke*, 274 F.3d at 466. Both the Satanic and Christian symbols were instances of the subject-content known as "proselytizing speech," which can be regulated more than other types of religious speech. *See Good News Club v. Milford Central School*, 533 U.S. 98, 130–34 (2001) (Stevens, J., dissenting); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

Moreover, the project never was intended as a forum for expression or debate of various viewpoints about anything, much less politics or religion.

> Implicit in the concept of the *nonpublic forum* is the right to make distinctions in access on the basis of subject matter . . . . The touchstone for evaluating these distinctions is whether they are *reasonable in light of the purpose* which the forum at issue serves.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (emphasis added). In light of the

purpose of the project (artistic beautification in a nonpublic forum), the principal's concern with restoring the learning environment and avoiding an Establishment Clause violation was consistent with a reasonable and permissible content/subject-matter distinction.

F. *Bannon* Clearly Supports and Requires Viewpoint Neutrality

Petitioner's claim of conflict rests upon the unfounded factual argument that the principal engaged in invidious viewpoint discrimination against Petitioner's religious speech—a contention plainly rejected by the court below. *See Bannon*, 387 F.3d at 1216–17. Moreover, Petitioner mischaracterizes the holding of *Bannon* by claiming that "the Court of Appeals . . . h[eld] that this viewpoint discrimination was justified," and that the decision will be used "as justification for further acts of viewpoint discrimination." Pet. 19. Petitioner claims certiorari is needed to "make plain that viewpoint discrimination is prohibited . . . ." Pet. 11.

Yet, the *Bannon* decision itself expressly prohibits viewpoint discrimination: ". . . *Hazelwood* does not allow a school to censor school-sponsored speech *based on viewpoint*." *Id.* at 1215. This decision is consistent with the earlier holding in *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) ("Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on *viewpoint*."). Petitioner is patently wrong in claiming that "censor[ship] . . . because [of] the point of view . . . of [which] . . . individual officials disapprove" was "precisely th[e] kind of censorship that occurred in this case." Pet. 13. This allegation contradicts the evidence and the courts below.

Where, as here, a defendant asserts a content/subject-matter viewpoint-neutral basis for its

decision, the burden rests with the plaintiff to demonstrate that the asserted basis is a pretext for viewpoint discrimination. *See Mesa v. White*, 197 F.3d 1041, 1047–48 (10th Cir. 1999). However, Petitioner conceded that the principal had no invidious motive in removing any of the symbols or messages deemed offensive. (SD 101–104.) The Eleventh Circuit implicitly recognized that the record provides no evidence of pretext, correctly finding that the editorial control was validly subject-matter/content-based. Pet. App. A-31 (finding a "permissible exercise of control"); *Bannon*, 387 F.3d at 1216–17 (the school "restricted speech on basis of the content, not viewpoint," in order to cure the "disruption to the school's learning environment caused by [Petitioner's] murals" (and, the district court found, in order to avoid "endorsement of religious views." Pet. App. A-31.)).

Petitioner's bare assertions of discriminatory motive "do[ ] not suffice to allege impermissible viewpoint discrimination. Plaintiffs must identify the *particular subject matter* as to which expression is *permissible* . . ., but *as to which* plaintiffs' *viewpoint* has been wrongfully excluded." *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City School Dist.*, 81 F.Supp.2d 1199, 1202 (D.Utah 1999). There is no record evidence to support the claim that the "rationale for the restriction" was "target[ing] *not subject* matter, but *particular views* taken by speakers *on a subject*," based on "the specific motivating ideology or the opinion or perspective of the speaker [on that subject]." *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) (citations omitted). Nor is there any evidence that the murals were intended for expression of viewpoints on any subject, much less potentially-divisive subjects such as politics or religion, which Petitioner admitted can be controversial. (SD 139–140).

The project's faculty sponsor, Mrs. Roberts, apparently had immediate concerns about the legality of

the paintings under the Establishment Clause, which she brought to the principal's attention the very evening of the painting; record evidence shows the principal and Mrs. Roberts were not personally opposed to the perspective of the messages; additionally, profanity, gang symbols, and all the overt religious speech—including Satanism—was removed, not only messages from a Christian perspective; and the principal had substantial pedagogical concerns about the disruption that had already begun to occur in the hallways and in the classrooms. The principal's editorial control was plainly viewpoint-neutral, as *Bannon* expressly requires.

G. This Court Recently Denied Certiorari in a Similar Case, Even Though It Expressly Allowed Viewpoint Discrimination

The Tenth Circuit recently decided a case similar to *Bannon*. *See Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). Although the facts and results were similar, the rationale was different. *Bannon* plainly prohibits viewpoint-based discrimination against school-sponsored expression under *Hazelwood*, whereas *Fleming* expressly decided that *Hazelwood* allows viewpoint discrimination, based on language in *Hazelwood*:

> "A school must . . . retain . . . *neutrality on matters of political controversy*." *Hazelwood*, 484 U.S. at 272. No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint.

Fleming, 298 F.3d at 928 (some citations and internal quotes omitted, alteration and emphasis added). *Fleming*

also persuasively pointed out: "If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as 'God is Hate,' once it allows tiles that say 'God is Love.'" *Id.* at 934.

Given its authorization of viewpoint discrimination, *Fleming* was far more remarkable than *Bannon*. Yet this Court found *Fleming* to be unworthy of certiorari just two years ago; and it seems the Court should find *Bannon* even less interesting.

II. No "Split" Exists When the Circuits Have Unanimously Reached the Same Results under *Hazelwood* and this Court Has Denied Any Petitions for Certiorari

In the course of holding that schools may exercise substantial control over school-sponsored speech in a nonpublic forum under *Hazelwood*, six circuits have commented on whether viewpoint neutrality is required. On both sides of that question, many of these circuits have made their comments in dicta, nonessential to their holding, and all have held that the speech in question was properly restricted under *Hazelwood*.

First Circuit: Upheld a school's restriction on a teacher's speech regarding abortion and noted that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (citations omitted). *Ward* reasoned that "public schools may limit classroom speech to promote educational goals" due to the need, among others, "for public school officials to assure . . . 'that the views of the individual speaker are not erroneously attributed to the school'" (quoting *Hazelwood*, 484 U.S. at 271 (1988)).

Third Circuit: Upheld a school's right to limit a student's presentation of religious material in class and to move a student's poster with a religious theme, noting that "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns." *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172–73 (3d Cir. 1999), *aff'd on other grounds*, 226 F.3d 198 (3d Cir. 2000) (*en banc*), *cert. denied*, 533 U.S. 915 (2001).

Sixth Circuit: Upheld a university's control of student speech in yearbooks under *Hazelwood*, noting: "[I]f the school did not intentionally create a public forum, then the publication remains a nonpublic forum, and school officials may impose any reasonable, non-viewpoint-based restriction on student speech exhibited therein." *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999), *rev'd en banc on other grounds*, 236 F.3d 342 (6th Cir. 2001).[4]

Ninth Circuit: Upheld a school's refusal to publish family-planning ads in school publications as a permissible viewpoint-neutral subject-matter restriction under *Hazelwood*. *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991). The Ninth Circuit also upheld a school's declining to display religious speech on the ball field fence, allowing viewpoint-neutral content-based restrictions which "exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000).

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[4] The *en banc* court vacated the panel's decision and invalidated the university's control over the yearbook speech after finding a limited public forum instead of a nonpublic forum and deciding that *Hazelwood* did not apply to this extracurricular college-level activity.

Tenth Circuit: Upheld a restriction on religious speech on tiles to be affixed to the school walls, holding that *Hazelwood* did not require viewpoint neutrality. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 928 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

Eleventh Circuit: Allowed viewpoint-neutral content-based restrictions on denigrative anti-military political speech, noting: "*Hazelwood* involved a content based distinction. . . . There was no indication that the principal was motivated by a disagreement with the views expressed in the articles." *Searcey v. Harris*, 888 F.2d 1314, 1324–25 (11th Cir. 1989). However, "exhortative and denigrative presentations by speakers for the purpose of denouncing certain careers . . . may properly be banned" as content-based restrictions. *Id.* at 1326.

Where the various circuits have reached the same result of permitting restrictions on school-sponsored religious or political speech under *Hazelwood*, it matters little that some have followed different rationales. Further, in any of these cases in which a petition for certiorari was filed, this Court has denied each petition. There is no true "split" among the circuits when they reach the same results and, in many instances, cite each other for support.

III. THE ELEVENTH CIRCUIT COURT COULD HAVE AFFIRMED ON SEVERAL OTHER GROUNDS

The Eleventh Circuit affirmed the district court's judgment under *Hazelwood* because it was the most obvious basis for a decision. Neither court had occasion to reach the several other grounds upon which we believe the Eleventh Circuit would also have affirmed. These issues are summarized here to indicate the complications of the case and the likelihood that the district court's judgment would be affirmed in any event.

A. Disruption and Interference

Had the semi-permanent murals been purely private student speech that just happened to occur on school grounds, the commotion and disruption accompanying the displays should have justified the school's editorial control even under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (allowing a school to ban silent wearing of black armbands if administrators could reasonably forecast substantial disruption of, or material interference with, school activities or if there was any showing that disturbances or disorder actually occurred).

As shown in the Factual Background section above, in *Bannon* there was not only a reasonable forecast of disruption, but also actual disturbance and material interference with the learning environment. Although the Eleventh Circuit mentioned the disruption and commotion, it did not need to focus extensively on the disruption because the murals clearly were school-sponsored speech under the *Hazelwood* standard (rather than purely private speech just happening to occur on school grounds under *Tinker*)—and *Hazelwood* does not require a showing of substantial disruption; it only requires legitimate pedagogical concerns.

Even so, the commotion and disruption intensified the principal's pedagogical concerns. "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, . . . [t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 788 (1985). "In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ." *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). The Eleventh Circuit recognized that one of

the legitimate pedagogical goals was ending "the disruption to the school's learning environment caused by [Petitioner's] murals," and the editorial control was reasonably related to that goal "because it ended the disruption." *Bannon*, 387 F.3d at 1217. Had the speech been purely private expression just happening to occur on school grounds, such disruption certainly would have merited control under *Tinker*.[5]

B. Government Speech

The Eleventh Circuit could have affirmed on the broader basis of government speech. Where speech is not only school-sponsored but also becomes part of the construction walls for up to four years, the expression can properly be deemed government expression, over which the school has the right of full control. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001) (upholding a school's refusal to post viewpoints contrary to speech on the school's bulletin board, which was government expression to which viewpoint analysis is inapplicable).

C. Establishment Clause Neutrality

The Establishment Clause requires the school to be neutral toward religion, between the various religions, and between religion and nonreligion. *See Epperson v.*

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[5] Additionally, the principal's editorial control would have been justified under *Scott v. School Bd. of Alachua County*, 324 F.3d 1246, 1247 (11th Cir. 2003), *cert. denied*, 540 U.S. 824 (2003) (upholding a ban on displaying the confederate flag, without reference to a forum analysis). School administrators "must have the *flexibility to control the tenor and contours of student speech* within school walls or *on school property*, even if such speech does *not* result in a reasonable fear of immediate disruption." *Id.* at 1247-48 (internal quotations omitted; emphasis added). Proselytizing sectarian speech—no less than controversial political symbols—can spur divisiveness and controversy that hinders the school's educational mission.

Arkansas, 393 U.S. 97, 103–04 (1968); *Engel v. Vitale*, 370 U.S. 421, 430–31 (1962).

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the [school] will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

Proselytizing speech affixed to the divider walls would be perceived by a captive audience as endorsed by the school. "No viewer could reasonably think that it occupies this location without the support and approval of the government." *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 599–600 (1989). *See also Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (a school's policy of permitting prayer at football games was unconstitutional where the activity took place during a school-sponsored event, which was not a public forum); *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) (a school district's refusal to allow students to deliver a sectarian prayer or a sectarian and proselytizing valedictory speech as part of a graduation ceremony was necessary to avoid violating the Establishment Clause); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683–84 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995) (a portrait of Christ, donated to the school, in a hallway near the school office, had a proselytizing effect and failed the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Joki v. Board of Educ. of Schuylerville Cent. School Dist.*, 745 F.Supp. 823 (N.D.N.Y. 1990) (display of student's mural secured to the wall of the school auditorium as part of school decoration project, had the effect of conveying a message of government endorsement of Christianity and was prohibited by the Establishment Clause).

The school had a compelling governmental interest in avoiding violation of the Establishment Clause, justifying the minor content-based restriction on religious speech. "There is *no doubt* that compliance with the Establishment Clause *is* a state interest sufficiently compelling to justify content-based restrictions on speech" even in a traditional public forum. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (emphasis added). *Accord Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 151 (2001).[6]

Incidentally, disclaimer signs could not sufficiently neutralize the captive student audience's perception of school endorsement; "no sign can disclaim an overwhelming message of endorsement." *County of Allegheny*, 492 U.S. at 619. *Accord Smith v. County of Albemarle, Va.*, 895 F.2d 953, 958 (4th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990) ("It remains to be seen whether any disclaimer can eliminate the patent aura of government endorsement of religion."); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) ("[A] disclaimer of the obvious is of no significant effect.") (citation and internal quotations omitted). Further, where two faculty members had actually suggested or encouraged the proselytizing religious speech, a disclaimer of school involvement or endorsement could appear disingenuous.

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[6] Even a viewpoint-based restriction would have been justified by a compelling interest in avoiding violation of the Establishment Clause. "To discriminate 'against a particular *point of view* . . . would . . . flunk the test . . . [of] *Cornelius*, [but only] *provided that* the defendants have no defense based on the *establishment clause*.'" *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (quoting, with approval, *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (emphasis added)). *Accord Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501, 1508 n.13 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1053 n.7 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

D. Qualified Immunity

As shown in detail in the Respondents' brief in the Eleventh Circuit, the legal landscape predating February, 2002, would have informed a reasonable principal that the editorial control was lawful. Moreover, the Eleventh Circuit's ruling in this case is an indication that a reasonable principal should have seen *Hazelwood* as authorizing the editorial control, because a principal cannot be held to a higher standard of understanding than the courts. *Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1274 (11th Cir. 2000). Thus, the principal would be entitled to qualified immunity and there would be no liability even if, merely *arguendo*, the editorial control had been unconstitutional.

E. The School Board's Non-Liability

An alternative basis for affirmance by the Eleventh Circuit would be that, under the circumstances of this case, the School Board could not be liable for money damages under 42 U.S.C. § 1983, even assuming unconstitutional actions by the principal. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Denno v. School Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1276 and 1278 (11th Cir. 2000), *cert. denied*, 531 U.S. 958 (2000) (*Monell* allows entity liability for a school board "only if [the] constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law"—conditions inapplicable in *Bannon*.).

IV. This Case Is Unique and Complex, Not Conducive to Certiorari Review

There are several factual and legal complications that would impede straightforward review. For instance:

the allegedly "student-initiated" expression on Petitioner's murals was suggested and/or encouraged by two faculty members (apparently not in compliance with School Board Policy 2.122, which requires employees to exhibit neutrality toward religion, nor with the Equal Access Act, which prohibits faculty monitors from participating in the club activities, 20 U.S.C. §§ 4071(c)(2)–4071(c)(5)); the supervising teacher and principal immediately and correctly became concerned that the semi-permanent, strategically-placed 8-foot by 8-foot murals, to be in place up to four years, would violate the Establishment Clause; the school required only minor changes to the messages; the principal clearly had no invidious discriminatory motive; and only Petitioner's murals contained verbal messages, while the other murals simply met the expectation of colorful artwork to beautify the drab construction panels; there was commotion and disruption of the learning environment, but the disruption ceased after the messages were edited. Accordingly, this case would be less than conducive to certiorari review.

CONCLUSION

The Eleventh Circuit thoughtfully reached the correct result in *Bannon*, consistent with decisions of this Court and the results in similar cases in other circuits. The petition for writ of certiorari should be denied.

Respectfully submitted,

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